Supreme Court, U.S.
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No. _____

In The

Supreme Court Of The United States

JERRY MURPHY
Plaintiff – Appellant

vs.

METROPOLITAN TRANSIT AUTHORITY
Defendant – Appellant

On Petition for a Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit
Of The Southern District Of Texas
Houston Division

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented For Review

1. Has the Court of Appeals at the Fifth Circuit, in this case set aside the general principal of evidence law, by denying, without comment, a petition for rehearing that was presented on the grounds of evidence submission?

2. Is it proper for the Court of Appeals through its Circuit Judges to assert that: "Summary judgment is proper if … there is no genuine issue as to any material fact that the moving party is entitled to judgment as a matter of law." *Young v. Equifax Credit Info. Servs., Inc., 294 F. 3d 631, 635 (5th Cir.2002),* when the Plaintiff has asserted that there is a significant fact issue that the District Court Judge was incorrect about; and whether the non-discriminatory reason for termination found in the Panel's Opinion was one that was not supported by evidence?

3. Is it proper for the District Court Judge of the Southern District of Texas to assert that: "His employer says that it fired him for lying." *Pg. 1 Opinion for Summary Judgment,* when this assertion is a significant fact issue that has repeatedly been denied by the Plaintiff, and evidence has been provided that shows that the Plaintiff was not lying?

4. Is it proper for the Defendant, Metropolitan Transit Authority (*Metro/MTA*), to present 'hearsay evidence in the form of an October 8,

2002 memo written by David McMaster (Director Customer Service and Sales, Metro) where he makes hearsay allegations (*R458)* that Mr. Murphy's (*Plaintiff*) September 2002 document submission and statement meant that a van had been delivered and the vanpool begun operation.', and this be the only evidence used to substantiate to the Court that a lie was told by the Plaintiff?

5. Is it proper for the Court of Appeals' Circuit Judges to state: " In determining if there is a genuine issue of material fact, this court reviews the evidence in the light most favorable to the non-moving party." *Performance Autoplex II Ltd. V. Mid-Continent Casualty Co., 322 F.3d 847, 853 (5th Cir. 2003) [see page 3]*, and then proceeds to overlook the evidence presented by the Plaintiff which shows factual issues in dispute?

6. Is it proper for the Court of Appeals' Circuit Judges to make a declarative statement, as if factual, when it stated: " Every performance evaluation and nearly every correspondence in the record indicates Murphy's deficiency." (*Pg 4*), even though specific evidence in the record, *at Exhibit #10, Plaintiff Jerry Murphy's Response in Opposition to Defendant Metropolitan Transit Authority's Motion for Summary Judgment*, shows to the contrary, of the four 6-month evaluations, each of the first three (03-01-01, 8-02-01, & 2-11-02) had an overall rating of 'Completely Satisfies' standards? In addition, the Plaintiff has repudiated each item of correspondence in

the record as incorrect. (*R. 475-6, Murphy's 9-22-02 Performance Review rebuttal letter*)

7. Is it proper for the Court of Appeals' Circuit Judges to write: "Management finally terminated Murphy after the dissolution of a van pool group that Murphy organized; Murphy failed to provide prompt notice of the dissolution to management purportedly causing cost-and significant inconvenience." *Pgs 4 & 5*, even though evidence was presented, *at Exhibits # 4&5 of Plaintiff's Response to Motion for Summary Judgment*, that showed the van pool group had not dissolved and proper correspondence and communication about the van's correct status was submitted to MTA's management and is found in the Court's record (*R.606, R.608-R.610*)? Additionally, the assertion of 'causing cost and significant inconvenience' is a complete fabrication and is not verifiable or shown in the record.

8. Is it proper for the Court of Appeals' Circuit Judges to state: "Murphy produced no corroborating evidence to support these allegations regarding the dissolution of the vanpool.", even though, *Exhibit #4 of Plaintiff's Response to Motion for Summary Judgment*, provides specific evidence of written correspondence of the van pool group's continued interest in vanpooling as late as October 13, 2002 (*R. 606/Excerpt #18; e-mail from Jacque McKenzie, Supervisor, Reliant Energy, App.*)?

Questions Presented for Review- Continued

9. Is it proper for the Court of Appeals' Circuit Judges to state: "Murphy has produced no evidence that could undermine the poor performance evaluations that he received during his employment at MTA.", when the District Court denied the Plaintiff's Motion to Compel Documents necessary to show inequities in production crediting by Murphy's supervisor (*see docket item # 24*)? However, the Plaintiff did provide at R. 475, his performance review rebuttal letter.

10. Is it proper for the Court of Appeals to overlook a 162-page critical support document (*and Plaintiff's motion request to have the Court of Appeals to include this document in its review*) of the District Court docket item # 35, (*Plaintiff Jerry Murphy Provides 2nd Response to Defendant Metropolitan Transit Authority's Surreply to Defendant's Motion for Summary Judgment*), which was submitted to the District Court on the same date that the Court submitted it decision, March 22, 2004; and whether the Panel's Opinion fails to adequately credit the record evidence that Appellee's reason for termination was false and pretexual?

11. Is it proper that the District Court Judge can use defaming language in its description of performance issues of the Plaintiff (i.e. *"he lied about the existence of a vanpool"*) (*page 3*) when the Plaintiff must restrict his objection because the Defendant is allowed protection against 'defamation claims' by being 'of sovereign immunity' (*see R.520*); and when the District Court as a referee in the

disputes of this case has hampered the Plaintiff's position in defense of his performance by denying his Motion to Compel Documents (docket item # 24), and allowing for the Defense that 'Formal discovery is quashed' (*see Conference Memorandum at docket item # 14*)?

12. Is it proper for the District Court Judge to state that: "Murphy wishes away the paper record that he produced…., and the facts show that Murphy fabricated his work record." (*page 3*) "Metro,…, has substantiated why it fired Murphy: he misrepresented work that he did after a long period of underachieving." (*page 4*), as if these paperwork submission items are correctly being described as fabricated acts when it is actually the substantive fact finding essence of the case.

13. Is it proper for the District Court Judge to state: "… even if Metro had misinterpreted the representations about the vanpool, Murphy still would have no claim. It is irrelevant whether Metro's grounds for firing Murphy were erroneous as long as they are not transparent or false." (*page 3*), and then not allow fact finding procedures of transparency or mendacity?

14. Is it proper for the District Court Judge to state: "…it is unlikely that they (Murphy's supervisors and managers) discriminated against Murphy, with whom they shared protected traits." (*page 3*), when repeated unfair acts demonstrate unreasonable

Questions Presented for Review- Continued

maliciousness that can only be labeled as age and race bias?

PARTIES TO THE PROCEEDING

The following is a list of all parties to the proceedings in this case in the United States Court Of Appeal for the Fifth Circuit:

1. Jerry Murphy, Appellant – Petitioner/ pro-se
2. Deborah A. Richard, Senior Staff attorney for Metropolitan Transit Authority, Appellee-Respondent
3. Jeffrey C. Londa
   Michael D. Mitchell
   Stephen E. Hart
   Law Firm Of Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
   Attorneys for Appelle-Respondent

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PETITION FOR A WRIT OF CERTIORARI
OPINIONS BELOW

The opinion of the United Sates Court Of Appeals for the Fifth Circuit affirmed the decision of the United States District Court for the Southern District, which granted summary judgment in favor of the Respondent. The Fifth Circuit's September 1, 2004 opinion is printed here as App. 15-21. The District Court's March 22, 2004 Opinion for Summary Judgment is printed here at App. 21-26. This decision of the Fifth Circuit was petitioned for rehearing on September 14, 2004 (that petition of appeal is printed here as App. 1-14) and it was denied without comment on October 5, 2004. A Petition to Rehear at En Banc was submitted on October 18, 2004. The Fifth Circuit's Office of the Clerk responded refusing the submission on October 19, 2004.

STATEMENT OF JURISDICTION

This petition for a Writ of Certiorari seeks review of the opinion of the United States Court Of Appeals for the fifth Circuit entered on September 1, 2004.

Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). This Petition for Certiorari is timely filed pursuant to 28 U.S.C. § 2101(c).

APPLICABLE CONSTITUTIONAL PROVISIONS, RULES AND STATUES

1. The rules applicable to this case are as follows:
Federal Rule Of Civil Procedure 56
Rule 56. Summary Judgment

....

(c) **Motion and Proceedings Thereon**... The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law...

....

(e) **Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set fourth such facts as would be admissible in evidence, and shall show affirmatively that the affidavits is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by deposition, answers to interrogatories or further affidavits. When a motion for a summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or otherwise

specified in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

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2. The constitutional provision applicable to this case is as follows:

Constitution of the United States
Amendment VII – Civil Trials

In the suits at the common law, where the value of controversy shall exceed twenty dollars, the right of a trial by jury shall be preserved... U.S.C.A. Const. Amend VII (West 1987).

3. The statues applicable to this case are as follows:

Texas Labor Codes § 21.001 Purposes:

The general purposes of this chapter are to:

(1) provide for the execution of the policies of Title VII of the Civil Rights Act of 1964 and its subsequent amendments (42 U.S.C. § 2000e et seq.);

(2) identify and create an authority that meets the criteria under 42 U.S.C. § 2000e-5(c) and 29 U.S.C. § 633;

(3) provide for the execution of the policies embodied in Title I of the Americans With Disabilities Act of 1990 and its subsequent amendments (42 U.S.C. § 12101 et seq.);

(4) secure for persons in this state. Including persons with disabilities, freedom from discrimination in certain employment transactions, in order to protect their personal dignity;

(5) make available to the state the full productive capacities of persons in this state;

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(6) avoid domestic strife and unrest in this state;
(7) preserve the public safety, health, and general welfare; and
(8) promote the interests, rights, and privileges of persons in this state.

Texas Labor Code § 21.051 Discrimination by Employer

An employer commits an unlawful employment practice if because of race, color, disability, religion, sex, national origin, or age of the employer:

(1) fails or refuses to hire an individual, discharges an individual, or discriminates in any other manner against an individual in connection with compensation or the terms, conditions, or privileges of employment; or
(2) limits, segregates, or classifies an employee or applicant for employment in a manner that would deprive or tend to deprive an individual of any employment opportunity or adversely affect in any other manner the status of an employee.

STATEMENT OF THE CASE

Petitioner, Jerry Murphy brought suit against his former employer, Metropolitan Transit Authority, pursuant Title VII of the Civil Rights Act Of 1964 as amended by the Americans With Disabilities Act and/or the Age Discrimination in Employment Act. Jurisdiction was proper in the United States District Court for the Southern District Of Texas.

ARGUMENT: REASONS FOR ALLOWANCE OF THE WRIT

Facts Material to Consideration of the Questions Presented:

Jerry Murphy was terminated from the Metropolitan Transit Authority (Metro or MTA) on October 10, 2002; at the time Murphy was age 59. Murphy is an African-American. These points are undisputed by the Defendant. Murphy is claiming party to a protected class in an issue of age and race discrimination, and is sighting that termination, under discriminatory practices, has adversely affected him by preventing his retirement from the Metropolitan Transit Authority, and limiting his employment opportunities at other entities. On September 5, 2003 Mr. Murphy filed a claim, *pro se*, against Metro for violating his equal employment opportunity rights, by race discrimination, under Title VII; and for discriminating against him in violation of the Age Discrimination in Employment Act. Included in the original claim was a failure to promote claim, and discrimination of disability, retaliation, and defamation claim.

Judgment for the Defendant was granted; the District Court at the Southern District of Texas sustained Metro's Motion for Summary Judgment on March 22, 2002, under the disposition that: "Murphy has shown no facts that Metro fired him because of his age or race." This decision was appealed to U.S. Court of Appeals for the Fifth Circuit on May 14, 2002 on the

grounds that the District Court had errored in its interruption of fact issues presented by the Defendant. On September 1, 2004 the U.S. Fifty Circuit affirmed the District Court's judgment on the grounds that "Murphy has not rebutted MTA's nondiscriminatory reason for termination." On September 14, 2004 Murphy retained counsel with the Tran Law Firm to petition the Court of Appeals for a rehearing on the grounds of evidence submission. (*Appendix Pages 1-14)* On October 5, 2004 the Fifth Circuit denied the petition for rehearing, without comment. Mr. Murphy, *pro se*, Petitioned For Rehearing En Banc on October 18, 2004. This petition was refused by the Office of the Clerk on October 19, 2004 with instructions that Murphy had '90 days to file a petition for certiorari with the U.S. Supreme Court from…the denial of a petition for rehearing.' Mr. Murphy, Petitioner/*Pro se*, is now submitting this Petition For A Writ of Certiorari to The Supreme Court of the United States. This petition is inside the appropriate time frame according to the rules.

I.)

In the Petitioner's Response in Opposition to Defendant's Motion for Summary Judgment (*docket item # 30*) the following items were provided the District Court as age and race discrimination issues:

(1) "Pitts (*supervisor Sales Force*) was lighthearted with his comments about the older members on his staff." (*page 12*) "There is an age difference of 15 years in Petitioner and his supervisor, Mr. William Pitts. Although he denies making any age referenced statements in his deposition, it can be shown he is capable of indiscretion humor, by evidence of his e-mail (dated 1-31-02) to Petitioner concerning 'Friday's dress code'.

Mr. Pitts was capable of lighthearted harassment humor." (*pages 14 & 15*)

(2) David McMaster (*Director Customer Service & Sales*) continued to assert on 11-15-02 to the Texas Workforce Commission, falsely: "…'that Jerry had confirmed to our analyst, his manager, his supervisor and co-workers that this was an active vanpool when it was not.' This is not a true statement. Petitioner never reported this van group as an active vanpool, only that a van was scheduled for delivery to make it an active van group. The delivery fell through and Petitioner reported it as soon as he knew. Petitioner reported it verbally to Pitts on 9-27-02, and in writing two times, first on 9-30-02 and next on 10-04-02 {*see Exhibits # 5*}. McMaster was provided Petitioner's 10-04-02 e-mail to Pitts on 10-14-02. He (*McMaster*) had no reason to report *what* (sic) he did to the Texas Workforce Commission (*on 11-15-02*) unless there was malicious intent. At the very least he should have began a process of carefully looking into what Pitts was doing, and saying, in his reports about the Petitioner. McMaster*'s* (*sic)* mind set was racially motivated *as* (*sic*) he continued to be careless in his oversight responsibilities." (*page 13*) ***Mr. McMaster is a white male and he has demonstrated racial profiling with this act.***

(3) "There were two black male (*including Murphy*) van reps in the past two years of Petitioner's employment, both were terminated. Since the van rep staff has increased to 6 (*from previously being only* 3 *during Murphy employment*) there was four opportunities to consider adding another black

male to the van rep staff, none has been added (*as of January 2004*); a white female replaced Petitioner's position. (*per Defendant's disclosure information*)" (*page 13*)

(4) "Favorable assignments were given to the other staff members, who were not black." (*page 13*) *There was* "...a pattern of unfair and unequal assignments that resulted in substantially different production credits for Petitioner in comparison to the other reps. Petitioner was rated as less than efficient to *his* (*sic*) co-workers and this allowed management to put him under a performance review. The unfairness is relative to the credited vans count given to the other reps for work they did not perform." (*page 14*)

(5) "He (*Murphy*) was the only rep given a verbal warning on March 27, 2002 for an activity that the three van reps worked on." (*page 13*) *The other two reps were white and Hispanic.*

(6) "There were two van rep terminations while Plaintiff was on staff, prior to his termination. One of the persons was black the other was white. Pitts gave testimony in his deposition that corroborated Plaintiff's recollection that the staff was advised to not discuss the reasons or circumstances related to the white reps termination; but this was not done for the black rep. As a matter of fact, the terminated black rep's character was frequently referred to in a comedic matter in staff meetings." (*page 14*)

(7) "There were frequent comments in staff meetings that had a racial overtone, when the president of METRO was often in the press during the period she was being challenged

about her educational credentials." (*page 14*) *The Metro president was a black female.*

(8) "There are grounds to suspect Pitts of age related discriminatory bias as he knew *plaintiff* (*sic*) wanted to stay with METRO until *he* (*sic*) reached retirement age, (see disclosure document page 1; Memo from Pitts to Murphy 6-21-02) 'thanks again for sharing your thought with me. I will help you any way I can to insure you are with METRO for a long time.'" (*page 15*)

(9) "It is with this background that Plaintiff *views* (*sic*) the clandestine manner of his performance review and then termination as being age and racially bias." (*page 14*) "The circumstantial evidence of this case is relative to a pattern of unfair and unequal assignments that resulted in substantially different production credits for the Plaintiff in comparison to the other reps." (*page 14*)

The above nine stipulations were presented in the Petitioner's Response in Opposition to Defendant's Motion for Summary Judgment on February 20, 2004. However, the District Court has stated that: "Murphy has shown no facts that suggest that Metro fired him because of his age or race."

There were more age and race related issues described in the Petitioner's last submission to the District Court: 'Petitioner Jerry Murphy Provides 2nd Response to Defendant Metropolitan Transit Authority's Surreply to Defendant's Motion for Summary Judgment' (*docket item # 35*)

(1.) (*see page 23*): "This was a correctly submitted vanpool (*Reliant/Creekriedge*) group that did not come on line as scheduled; and it is no different from other members of the staff whose vans failed, but they were not terminated for it. [The best way to identify

vans that failed is by viewing the reports the Petitioner requested, but was denied by the court through the Defendant's objection.] Mr. Pitts preferred to see a problem with this group so that it would discredit Mr. Murphy, which was a pretext for his discriminatory age related bias…Mr. Pitts was biased toward Mr. Murphy in this instance and in the same manner he was biased toward Mr. Murphy's Annual Performance Review. Mr. Murphy wrote to Mr. Pitts' managers on September 22, 2002 (see Exhibit 35 attached, Murphy's deposition Ex. 8-pgs. 30-32 (response letter to performance review 9-22-02)) pointing out factual errors in Mr. Pitts' evaluation of his production activities. Mr. Pitts' managers overlooked these errors of Mr. Pitts because of their racial biases towards Mr. Murphy. The result is Mr. Pitts has brought them to this lawsuit."
(2.) (*see page 27*): "…Mr. Murphy's overall rating was indicated as 'Does Not Meet' standards when it correctly calculates to 'Satisfies Most' standards. If calculated correctly, this would have allowed Mr. Murphy to not be under a Performance Improvement Plan status in the first place. Mr. Pitts' managers have refused to look closely at Mr. Pitts' methods of inconsistency in his supervision. In Mr. Murphy's rebuttal letter on September 22, 2002 to Mr. Pitts' performance review he gave the management a clear opportunity to look at inequities of Mr. Pitts' supervision. They either ignored or refused to look at it fairly; and in Mr. Murphy's mind, they demonstrated racial profiling when Mr. McMaster continued to discredit Mr. Murphy on November 15, 2002 to the Texas Workforce Commission."
(3.) Murphy sited Pitts in his EEOC complaint (although he denied this in his deposition) as saying: *you are having difficulty getting the benefits position*

because 'they have too many blacks already down there in benefits' (*R.464*)
Mr. Murphy felt there was a predetermined mindset to not promote him to be a benefit manager due to his race, and because of poor references from his local managers.

II.)
The fact issue, relative to the paperwork submission, is about two documents found in the Defendant's Motion for Summary Judgment {(1) The Group Information Report [*R. 519 or Excerpt #9*] and (2) the Financial Incentive Report [*R. 526 or Excerpt # 10*], and one other document submitted from the record to the Court of Appeals (3) The Metrovan Daily Ridership Log [*Excerpt # 11*]}; and the misunderstanding William Pitts had as to how the three documents verify that a van is active and operational. The Group Information Report (*R. 519*) which was submitted by the Petitioner to Melanie Shepard (*Business Analysis/Incentive Coordinator, Metro*) on 9-18-02 is described by the Defendant to represent a 'nonexistent' vanpool group'. (*Defendant's Reply to Plaintiff's Response to Defendant's Motion for Summary Judgment, page 10, lines 5-7; R. 624*)

Mr. Pitts, according to his deposition testimony, thought the submission of the Group Information Report was an act that implied that a van was already delivered and operational. (*Excerpt # 22*)

Mr. Murphy has said, all along, this is not a correct description of procedures. The submission of the Group Information Report is the process that allows Ms. Shepard to prepare a Financial Incentive Report

(*R. 526*) document, which she gives to the van rep to deliver to a new van-group's coordinator/Primary Driver at the time the van is first installed. (*see page 9, Petitioner's Response in Opposition to Defendant's Motion for Summary Judgment, docket item # 30)*

It is because Pitts thought the Group Information Report submission-act was an indicator that a van was already operational, that he functioned with a disposition of entrapment to terminate Mr. Murphy. Even though Mr. Pitts' background with Metro (before his promotion to supervisor over both Sales Reps and Vanpool Reps) was that of a level 8 Sales Rep, he had been in his supervisory position for over a year when he made his incorrect assertion about why Mr. Murphy should be terminated. He should have known the correct vanpool installation procedures because he had been in his position long enough to know.

It was clear in his deposition on February 5, 2004 (nearly a 1 ½ years after Murphy's termination), that Mr. Pitts was still reporting incorrectly that Ms. Shepard does not give the first Financial Incentive Report to a van reps for delivery to the new van groups at the time of a van installation. (*Pitts' deposition page 14, section 1, Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment, R. 562*): *"I would disagree that she gives an Incentive Report for a first-time van."*

It is a fact issue that there cannot be a misunderstanding about what month a van is operational, without a Financial Incentive Report for a van to function under. For Mr. Pitts to assert that Mr. Murphy misled management about a van being operational implies there was a Financial Incentive

Report for the Reliant/Creekridge van group to function under relative to the September paperwork submission.
The Panel Judges site: *Young v. Equifax Credit Info Serv., Inc., 294f. 3d 631, 635 (5th Cir. 2002)*
"Summary Judgment is proper...if there is no genuine issue to any material fact that the moving party is entitled to judgment as a matter of law."

There is a material fact issue relative to what constitutes an active vanpool group. The defendant contends that the submission of the Group Information Report implies a vanpool group has been delivered a van and the vanpool group is actively functioning. The plaintiff contends that it is the signed Financial Incentive Report document that constitutes that a vanpool group is active and functional under the Metro van program. Further it is the verified/signed Ridership Log that constitutes whether federal/HGAC funding will be allowed on a vanpool group.

The Metro van program is a partial reimbursement of van leasing expenses, which occurs monthly after a van group has verified that it has ridden 12 days (per rider) in a month, in an approved van.

It is the verifying of 12 rides that makes Mr. Pitts' accusations against Mr. Murphy inappropriate. A van (in this case the Reliant/Creekridge van group) could not be thought to be already operational in September 2002 when Mr. Murphy turned in his Group Information Report paperwork on September 18, 2002, because there were not 12 riding days left for the month of September. Any van must be functional and operational on or before the 16th of <u>any month</u> in

order to have 12 riding days (assuming a 5 day work week) under the Metro van program.

Secondly, the Financial Incentive Report document is a beginning of the month signature document that verifies the rider's intentions before he rides for the month. Mr. Pitts did not know this at the time of his deposition. He thought of the document as an end of the month document. (*Exhibit # 23, plaintiff's 2nd Response to Defendant's Motion for Summary Judgment*) However, the document has the following statement in its center: **"Please obtain signatures & fax to METRO RideShare @ 713-652-8962 by the 3rd working day of the month for credit."** The final verifying of a completed 12-day/month ride occurs with the submission of the Ridership Log (signed by the van-group's coordinator/Primary Driver) at the end of the month; and that is how reimbursement procedures are validated every month.

For Mr. Pitts to assert that Mr. Murphy caused misrepresentation of an operational van when he submitted his Group Information Report on September 18, 2002, it would have to mean that Ms. Shepard had prepared a September Financial Incentive Report for the van group to function under. However, there is only an October, 2002 Financial Incentive Report; implying she was not confused about what month in which this van was to be functional. Even though the Defendant indicated there were reports prepared to upper management that included this van group, Mr. Murphy did not see these reports, so he could not be responsible for them since he had no knowledge of them. It would be Mr. Pitts's responsibility to correct status reports of vans that go to upper management because he was the management level person that knew the correct status.

The fact that the Reliant/Creekridge van was only scheduled to be operational in October remains an undeniable fact because there was no September Financial Incentive Report executed for the Reliant/Creekridge vanpool group to function under.

If this van was not thought to be a September van by Ms. Shepard then Mr. Murphy could not have caused the confusion stated by the District Court: "In mid-September 2002, Murphy submitted paperwork for a new vanpool that he had been arranging; it lead supervisors and coordinators to believe that the pool had become active. This new group was reported to Metro officials, and Metro applied for federal funding for it. In early October, Murphy's supervisors discovered that the vanpool had never started operating." (*page 2*)

The District Court's interpretations of events are based on the court accepting Mr. Pitt's assertions about vanpool procedures as correct. However, this is not correct because the mid-September paperwork submission did not 'lead the coordinator to believe a pool had already become active' because she did not prepare a September Financial Incentive Report for the pool to function under. Additionally, it is unlikely Ms. Shepard applied for federal funding of this vanpool prior to it completing 12 riding days in October. The court has been misled by Mr. Pitts not being correct about vanpool procedures. In the same manner Mr. Pitts misled, and was not honest with, Mr. McMaster when he (McMaster) wrote in the 10-8-02 memo:

"(Jerry)… also informed his supervisor and manager of the delivery. The vanpool was never actually delivered and at no time following these reports did Jerry advise his supervisor, his manager or the

incentive coordinator that the vanpool had actually begun operation." *This is not a correct statement because evidence has repeatedly been shown that Mr. Murphy did keep Mr. Pitts advised of the exact status of the van delivery procedures. There is no evidence of a signed Financial Incentive Report for September to indicate 'Jerry reported the delivery'. However, there are several e-mails evidences that point to Mr. Pitts being kept up-to-date.* The Defendant's Motion for Summary Judgment rest on this hearsay statement provided by McMaster (*no testimony was provided*) who would be an *interested witness* in this case. The Supreme Court explained in *Reeves* that the lower courts should not base summary judgment on evidence that comes from interested witnesses. *Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 2110, 147 L. Ed. 2d 105, 120 S. Ct.2097 (2000). The Fifth Circuit holds that cases , which turn crucially on the credibility of witnesses' testimony, should not be resolved on summary judgment. Bazan v Hidalgo County, 246 F.3d 481, 492 (5th Cir. 2001), quoting Abraham v. Raso, 183 F.3d 279, 287 (3rd Cir. 1999). Secondly, a factual conclusion may only be reached from a summary judgment motion when it is 'the only reasonable interpretation' of the record. Blow v. City of San Antonio, 236 F3.d 293, 297 (5th Cir. 2001).*

The actual facts are these:

1.) On 9-27-02, the date the van was scheduled to be delivered, Mr. Murphy told Mr. Pitts, verbally, he was having difficulty making contact with the person to receive the Reliant/Creekridge van. While in the field for two deliveries that day Mr. Murphy called Mr. Pitts to update him that he still had not made contact with

the person to receive the second van (the Reliant/Creekridge van). Mr. Pitts instructed Mr. Murphy to cancel the delivery and return to the office. (*see Exhibits 5, Plaintiff's Response to Defendant's Motion for Summary Judgment, excerpt # 13, e-mail from Pitts to Murphy, Re: Creekridge No Shows*)

On 9-30-02 Mr. Murphy wrote the following e-mail to Mr. Pitts: "FYI: The appointment for Creekridge has been changed to Wednesday per Judi Walters (*Executive Director Administrative Services, Reliant Resources*). Also both (*Reliant*) van deliveries have been delayed due to riders' changes; at Creekridge we lost the primary driver because she was reassigned to the downtown location, and the downtown van still needs two more riders from Sugarland area to join. We are expecting the two events to produce the riders we need." (*see Exhibits # 5 or Excerpt # 14*)

2.) On October 1, 2002, 9: 38 AM, Mr. Pitts prepares an e-mail to Mr. Murphy stating: "I took the Creekridge *event* (*sic*) off the calendar today. Thanks" (*Excerpt # 14 & 26*)

This is another indication Mr. Pitts was told the delivery was not made since he took it off the department calendar.

3.) On 10-01-02, (about 10: AM) (*the day the Reliant/Creekridge van group should have begun operating*) Ms.Evangeline Soto-Chairez called a meeting of the van rep staff in her office to get an update on out-standing vans. Attending at that meeting was Jerry Murphy, William Pitts, John Nunez, Melanie Shepard and Evangeline

> Soto-Chairez. In that meeting Mr. Murphy said the Reliant/Creekridge van group was delayed because he needed to find a replacement driver since the current driver had been transferred; and that several of the van group riders were considering replacing the primary driver. Ms. Soto-Chairez then gave permission for the Reliant/Creekridge, and any other van group, to have until October 15, 2002 to have everything complete. (*Exhibit # 16, Plaintiff's 2nd Response [to Metro's] Surreply to Defendant's Motion for Summary Judgment).*

4.) On 10-03-02 Mr. Murphy submits his monthly report of September showing all his van deliveries for the month. The Reliant/Creekridge was not included as a delivered van; *therefore, this is another indicator there could not be any confusion that it was active.* (*R. 478-9*)

5.) On 10-04-04 in the weekly staff meeting Mr. Murphy made the same statement about the Reliant/Creekridge van driver being transferred, and the delivery delayed. Later that day in an e-mail to Mr. Pitts, Mr. Murphy again writes the following: *"Bill: There has not been a van delivery at Reliant, although two groups look very promising:...2) The second group was from Creekridge. This was a complete group formed (sic) of 8 (riders) from the first meeting on 9-18. Three people completed driver applications and all 8 made out the Group Information form. Approval was given of the Primary driver and the two alternates on Wednesday 9-25 and Simon*

(Enterprise Leasing rep) was ready to deliver the van for Friday. I started calling the primary driver on Wednesday, but had to leave messages because she does not have a direct line. On Thursday I made contact with one of the riders and asked her to pass on the message for the primary driver to call me. By Friday I had not heard anything so I canceled the delivery with Simon. On Monday I heard from the Primary driver that she had been transferred to downtown. I have polled 4 of the original people and they still want to be on a van. We need a leaseholder and/or another driver. I expected these 4, at least, to come to the meeting today and make a decision who would be the leaseholder. I will see what happens on Monday." (*see Exhibit # 5*) In the Metrovan program the Primary Driver is also the leaseholder of the van. When you lose a Primary Driver you lose the leaseholder of the van.

6.) September 10, 2002 Mr. Pitts writes a Performance instruction e-mail to Mr. Murphy: *"Jerry, I want to clarify that the Performance Improvement Plan you received as part of your most recent evaluation must be complied with regardless of any other conversations, discussions or other activities you chose to perform or are assigned to by management.*

To document your plans and activities use the MS Outlook Calendar and fill in completely with your activities between the hours of 8 and 5. No part of the day should be unaccounted for on the calendar." (*R.512, Defendant's Motion for Summary Judgment*)

Mr. Murphy offers this as example to the Court as to why Mr. Pitts had to know exactly what Mr. Murphy did and when, because Mr. Murphy was under direct performance instructions to report all of his activities, and he did.

Mr. McMaster was incorrect to say in his 10-08-02 memo that Mr. Murphy did not 'advise his supervisor, his manager or his incentive coordinator that the (*Reliant/Creekridge*) vanpool had not actually begun operation.' He had been misled by Mr. Pitts. Mr. Pitts may have made a mistake to assume the Group Information Report submission-act was a process that implied the van was operational, but he did not try to correct the mistake before terminating Mr. Murphy with this concept, even though he clearly knew that Mr. Murphy had kept him informed of the actual status of the van as it developed. Mr. Pitts was not honest about what he knew when he signed-off on Mr. Murphy's termination letter on 10-10 -02, which said: "...you did not inform METRO that the vanpool had dissolved due to external factors." *The vanpool group had not dissolved, and Mr. Murphy did inform Mr. Pitts of the status of the van group, verbally and in writing, on several occasions.*

III.)
The above is the same type of inconsistent, inert management style that Mr. Murphy shows is unfair age and race bias on the part of Mr. Pitts throughout his relationship with him; and since his immediate managers (white and Hispanic) would not investigate the matter, they showed racial bias themselves. There can be no other reason for so many management mishaps such as:

1.) Mr. Pitts and Ms. Soto-Chairez did not acknowledge that they had a van-delivery update meeting on October 1, 2002 where they were clearly informed about the status of the Reliant/Creekridge van situation. The same information was reported again at the weekly staff meeting on October 4, 2002, which was attended by Mr. McMaster (*McMaster normally does not attend the weekly staff meetings*).

2.) Mr. Pitts asserted that the van sales objective was set at 12 vans per year, or one van per month in Mr. Murphy's performance review, when the objective was only in the planning stage for next fiscal year according to his e-mail announcement to the staff on May 31, 2002.
It says the following: *"So you are prepared and informed well in advance, I'm in the process of developing minimum quotas or targets for the number of vans or ride sponsor accounts you generate. While there are many factors that go into reviewing job performance, as RideShare and Sales reps, generation of new vans or RideSponsor accounts is ultimately the reason you are here. Tentatively, this will start with the new fiscal year (which starts October 2002). ...Early thoughts are everyone will have to bring in a minimum of 12 vans or accounts a year. You might bring in one a month or two every other month, but you will need to achieve the minimum required on average to be considered successful in performance measures. Again this is preliminary."* (*Exhibit # 39 Murphy's deposition*)

3.) William Pitts wrote the following on 12-12-03 regarding Murphy's last performance evaluation that ended 8-11-02: "Jerry did not put enough vans on the road on his own. Jerry should have been putting an average of a van a month on the road, especially when

you consider the amount of time Jerry spent in the office. Jerry routinely came in early and worked late, working longer hours than any other Rideshare or Sales rep but produced the least amount of vans as you can see from other reps accomplishments." (*R. 535, Defendant's Motion for Summary Judgment) Pitts' above statement is not consistent with the chart he provided the court. (Exhibit 39, Plaintiff's Response [to Metro's] Surreply to Defendant's Motion for Summary Judgment) This shows Murphy's van count from September, 2001 through August, 2002 to be 11 vans.*

4.) The following is from Murphy's Rebuttal to his 8-29-02 Performance Review: (*Pitts writes*) "He (Murphy) has formed one new van to date this year, falling short of the planned twelve vans for fiscal 2002." (*Murphy's response:*) "When this was written I had 7 vans *(for the calendar year).* Currently, I have 10 vans completed inside the fiscal year. Even so, the goal of 12 for fiscal 2002 was never established; the goal of 12 vans was for the next fiscal year. I agree 12 vans is a reasonable minimum, and if I am allowed to be apart of the team of shared information and leads, 24 should be the average per person minimum." (*see R. 476*)

The differences in the above two messages is what Mr. Pitts does frequently. He is inconsistent with facts as it relates to Murphy's performance.

IV.)
The Court of Appeals restates several 'comments contained in Murphy's August 11, 2002 evaluation by Mr. Pitts' (*page 4 & 5*):

1.) "Jerry has made minimal contributions to date to the department objective of having 300 METROVans by the end of the year. He has formed one van to date this year, falling short of the planned goal of twelve vans for fiscal 2002."
However, this conflicts with Pitts' chart of van counts of all the reps in his deposition (Exhibit 11) that shows Murphy with 11 vans from September 2001 thou August 2002.

2.) "In June, Jerry was given a list of over thirty companies that should have been researched and contacted. Some have yet to be researched and contacted."
Murphy's rebuttal letter of 9-22-02 responded saying: '...my report to Bill showed all the companies had been researched and all had been contacted or attempted to contact by June 22nd.'

3.) "Jerry made the decision to continue working with El Paso energy for vanpool opportunities in spite of the fact they have excellent bus service...along with plentiful parking..."
Murphy's rebuttal letter of 9-22-02 responded saying: "For the record these are not the sentiments shared by the riders of the 3 newly formed vans of El Paso in Greenway." Murphy added 2 new vans in September 2002 with El Paso, and had 8 other vans pending when terminated, one more of which was with El Paso. (see Exhibit 39, Plaintiff's 2nd Response to Defense's Surepply, 3-22-02.)

4.) "Jerry made the decision this spring to send out a press release that was not approved as required and continued some activities against directions while keeping the activity hidden from management."

The press release item he is referring to is for an ad to be placed in the Angleton newspaper. They had requested an early draft copy to evaluate the lay out, it was not considered the final approved version. The project had been worked on by the three van rep staff members and Pitts knew this, however he gave a verbal warning to only Murphy. (R. 510)
It was this situation that Mr. Murphy first challenged Mr. Pitts' unfairness by going to H.R. and reporting the incident because nothing had been hidden from Mr. Pitts, and he did not give a verbal warning to the other staff members. HR directed Mr. Murphy to go through local management to work things out. In attempting to do this, Ms. Soto-Chairez responded with 'I am disappointed you took this matter out of the department;' and Mr. McMaster indicated, 'Don't worry about a verbal warning, it will not be apart of your permanent record.'

5.) "He (*Jerry*) continues to spend too much time working on small individual groups, as oppose to working at the corporate level through H.R. departments. He has been given reminders to re-focus his efforts on corporate accounts."
Murphy responded to this accusation in his Performance Review rebuttal letter 9-22-02: "Bill has contended that the other representatives' work with H.R. personnel to accomplish getting vans going, and this approach produces more vans. This statement has some merit; however, those H.R. personnel come to METRO needing help with their employee relations because of such things as corporate moves or merges. When leads from H.R. persons like these come in, they are never given to me. My effort to find new H.R. people with whom to work has not produced one open door opportunity. Therefore, as long as I still have to put vans on the

road, I would go back to forming vans from individual contacts. This is not to say I refuse to work with H.R. personal. Bill seems to want me to spend all my time establishing new HR contacts, but at the same time he gives the strong leads to someone else. Case in point: UT Medical has turned out to be a great account that has produced several vans. I was assigned the Medical Center in mid-February. While I was attempting to develop a relationship with HR personnel, I was critiqued on where I was going and why I was going there. I was required to provide a list of my activities, whereupon they reassigned the facilities in the medical between John Nunez and me (sic). John was given most of the facilities that had 100% subsidies for its employees.
Most importantly, I was never made aware that the University of Texas (UT) was expanding its interest in vanpooling and would be increasing its subsidy to enhance this opportunity. My telephone log shows how I was calling personnel at UT. Bill never let me know he was working with personnel at UT on a higher level. This is an example of how Bill kept important lead information from me and gave it to other reps. This type of example can be shown in other areas of the TMC (Texas Medical Center) Inc., Enron, El Paso, and Reliant. I have been asked to keep him informed on developments, but he is selective in what I am told." (R. 475-476)

V.)
The Court of Appeals' Circuit Judges write: "Every performance evaluation and nearly every correspondence in the record indicate Murphy's deficiency." (*see pg. 4)*
The following is from the plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment (Docket item # 30, page 7, lines 2-4):

"February 11, 2002 Plaintiff received a 'Completely Satisfies' rating on his semi-annual performance review. This marked the third consecutive six-month review since his employment each providing a 'completely satisfies' rating." (*Exhibit 11, provides performance evaluation pages for periods 3-01-01, 8-02-01 & 2-11-02. The panel is incorrect about its assertion.*)

For the Courts of Appeals panel Judges to assert 'every performance evaluation…in the record indicates Murphy's deficiency' they are obscuring the time frame of this case. Murphy's alleged performance deficiencies were of the last six months of his employment only. Murphy is asserting in his complaint that this harassment began after he went to HR to report the unfair treatment in the verbal warning of March, 2002. Shortly after that Pitts came to Murphy's office and suggested he apply for a position in benefits. It was after Murphy applied for the Manager of Benefits in April 5, 2002 that Pitt's again came to Murphy's office and said: 'If you get that position you'd be making more money then me.' (*Pitt's deposition page 164*)
It is from this time that Murphy's harassment intensified until he was given a negative and unfair performance evaluation in August 2002.

CONCLUSION:

The issues in this complaint are about age and race discrimination that the petitioner claims was the pretextual cause of Mr. Murphy's termination. The Court of Appeals stated that the Appelle presented non-discriminatory reasons for the termination when Murphy failed to provide prompt notice of a dissolved vanpool group. The District Court said Murphy

misrepresented work that he did after a long time of underachieving.

Murphy has shown the court that he did give prompt notice of communication about the vanpool group, Reliant/Creekrigde. Even so, the vanpool group had not dissolved, and confirmation of the group's continued interest was provided the court. Murphy's production performance was not deficient and his performance evaluation, which was reported as overall 'Does Not Meet' standards, was not calculated correctly; it properly calculates to an overall total of 'Satisfies Most'. Mr. Murphy should not have been under a 90-day Performance Improvement Plan (PIP).

The Court of Appeals reviewed this case 'assuming arguendo' that Murphy has established a prima facie case, leaving for Murphy to rebut Metro's non-discriminatory reasons for termination. The Court of Appeals and the District Court were misled by Mr. Pitts' incorrect understanding of standard vanpool procedures. Even so, it was his not telling the truth about the communications of the van's status that made Mr. Pitts' actions pretextual in this case. Mr. Pitts demonstrated discriminatory age and race biases against Mr. Murphy. Ms. Soto-Chairez and Mr. McMaster demonstrated race bias against Mr. Murphy when they terminated him for pretextual reasons.

In this presentation to the Supreme Court Mr. Murphy has had to present his case as a layman (*pro-se*). He has attempted to validated these issues with legal precedence. However, he asks the court to accept the Petition for Rehearing to the Court of Appeals that was prepared by The Tran Law Firm where by he provides more extensive legal precedence for the

issues of the case. (App 1-14). "MTA based its defense of Mr. Murphy's termination on false vanpool reporting as the sole violation of Mr. Murphy's Performance Improvement Plan that resulted in his termination. If Mr. Murphy had not violated his PIP, he would not have been terminated. MTA's non-discrimination reasons for terminating Mr. Murphy had been proven to be false."

Mr. Murphy asks the Supreme Court to correct this injustice done to him, by reversing the lower courts and allowing this case to go to trial by jury to resolve the dispute.

Respectfully submitted,

Jerry Murphy

Jerry Murphy
January 2, 2005

App. 1
04-20756
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JERRY MURPHY

Plaintiff—
Appellant

V.

METROPOLITAN TRANSIT AUTHORITY

Defendant—
Appellee

On Appeal from the United States District Court
for the Southern District of Texas, Houston Division

PETITION FOR PANEL REHEARING

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TABLE OF AUTHORITIES

FEDERAL CASES:

Bazan v. Hidalgo County, 246 F.3d 481, 492 (5th Cir. 2001)

Blow v. City of San Antonio, 236 F.3d 293, 297 (5th Cir. 1999)

Celotex Corp. v. Catrett, 477 U.S. *at* 327, 106 **S.Ct.** *at 2555* (1986)

Quoting Abraham v. Raso, 183 F.3d 279, 287 (3rd Cir. 1999)

Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150-51, 2110,

147 L. Ed. 2d 105, 120 S. Ct. 2097 (2000)

Rhodes v. Guiberson Oil Tools, 75 F.3d 989 (5th Cir. 1996)

St Paul Mercury Ins. Co. v. Williamson, 224 F.3d 425, 443

(5th Cir. 2000)

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St Paul Mercury Ins. Co. v. Williamson, 224 F.3d 425, 443

(5th Cir. 2000)

PETITION FOR PANEL REHEARING

Questions Presented:

- Whether the Non-Discriminatory Reason for Termination found in the Panel's Opinion was one that was Not Asserted By MTA And Not Supported By Evidence

- The Panel Overlooked Material Issues of Fact that Makes Summary Judgment Inappropriate.

- Whether the panel's opinion fails to adequately credit the record evidence that Appellee's reason for termination was false and pretextual.

1. TIIE **COURT** FOUND NON-DISCRIMINATORY REASON **FOR**

App. 5

TERMINATION WAS NOT ASSERTED **BY** MTA **AND NOT SUPPORTED BY** EVIDENCE.

The panels opinion overlooks the record evidence and reaches factual conclusions that are not supported by the record and are contrary to the argument presented by the Metro Transit Authority ("MTA"). In its opinion, the panel found that "[m]anagement finally terminated Murphy after the dissolution of a vanpool group that Murphy organized; Murphy failed to provide prompt notice of the dissolution to management (Opinion pgs. 4-5).

On the contrary, MTA's legitimate, non-discriminatory reason for its decision to terminate Mr. Jerry Murphy has always been that he submitted a document on ". . .a vanpool that did not exist" and stated "that the nonexistent vanpool was a 'go"'. (R. 354) The District Court's finding reiterated MTA's position by stating that "he lied about the existence of a vanpool. Metro fired him for this." MTA argues that the nonexistent vanpool violated Mr. Murphy's 90- day Perfoinance Improvement Plan ("Pm") and directly resulted in his termination. (337, *See* Appellee's Brief pgs. *5-6)*

The appellate record is devoid of any MTA argument or summary judgment evidence that support the Panel's opinion that Mr. Murphy was terminated for failing to provide prompt notice to management of the dissolution of a vanpool that he organized. The Court's finding assumes that a vanpool group that Mr. Murphy organized did exist and that he violated MTA

rules when he failed to provide prompt notice of the dissolution to management. Such finding cdnfirms an issue of material fact in Mr. Murphy's favor (that a vanpool existed) then presents a new non-discriminatory reason for terminating Mr. Murphy that was never asserted by MTA and not found in the record (violation of a rule requiring timely reporting of a vanpool dissolution). Summary judgment motions must be narrowly construed with respect to the arguments articulated in them. Such a motion can only be granted on grounds actually asserted by the movant. St. *Paul Mercury Ins. Co. v. Williamson,* 224 F.3d 425, 443 (th Cir. 2000) (for court of appeals to sustain summary judgment, grounds must have been raised below by the movant).

2. **THE PANEL OVERLOOKED MATERIAL ISSUES OF FACT THAT MAKES SUMMARY JUDGMENT INAPPROPRIATE.**

If the non-movant presents evidence creating a genuine issue of material fact, summary judgment is improper. *See* **FED.** R. Civ. **P.** 56[c]). Mr. Murphy presented uneontroverted summary judgment evidence that MTA's legitimate, non-discriminatory reason for his termination was false.

MTA argues that it had a noxdiscriminatory reason for firing Mr. Murphy: he violated the terms of a 90 day Performance Improvement Plan (PIP) when he presented a document for a vanpool that did not exist and stated that it was a "go." (Appellee's Brief pgs. *4-5)* As a result, MTA disseminated erroneous reports and information to both internal Metro management and to external partners. (Appellee's Brief pgs. 15)

There are several material issues of fact that are in dispute:

MTA argues that Mr. Murphy violated his PIP by filing a document on a vanpool that did not exist. (R. *354)* The panel's opinion ignores the fact that MTA has failed to provide any summary judgment evidence that the vanpool, that Mr. Murphy was attempting to initiate, did not exist. Defendant cannot rely on conclusory statements to establish that plaintiff has not presented evidence on an essential element of its claim. Rather, Defendant must demonstrate an absence of genuine factual dispute. *See Celotex Corp. v. Catrett,* 477 U.S. at 327, 106 S.Ct at 2555

Appellant argues that the vanpool did exist. The record supports that conclusion. The hand written entry of personal contact. information in the "Vanpool Group Information" Report by each of the participants and driver in the vanpool in question lends credence to Mr. Murphy's claim that a vanpool he organized existed and was not a fabrication. (R. 510) Even as late as October 13, 2002, the group of vanpool participants that Mr. Murphy organized still existed and were willing to proceed with the vanpool program. (R. 886)

3. THE PANEL'S OPINION FALLS TO ADEQUATELY CREDIT THE RECORD EVIDENCE THAT APPELLEE'S REASON FOR TERMINATION WAS FALSE AND PRETEXTUAL.

There is a material issue on whether or not Mr. Murphy deceived MTA regarding the status of the vanpool he organized. MTA concedes that Mr. Murphy "was attempting to initiate a new vanpool in the program."

(App.ejlee's brief pg. 5). The material issue of fact lies in the meaning of the September 20, 2002 "Vanpool Group Information" Report (R. 510) that Mr. Murphy submitted to Metro's RideShare incentive coordinator, Mrs. Melanie Shepard and his September 26, 2002 statement to the same person.

MTA argues that Mr. Murphy's two September 2002 actions were deceptive and lead them to believe that the new vanpool was operational and active. (Appellee's brief pg. 5) To support this contention, MTA only provides hearsay evidence in the form of an October 8, 2002 memo written by David McMaster where he makes hearsay allegations that Mr. Murphy's September 2002 document submission and statement meant that a van had been delivered and the vanpool began operation. (R. 836)

Mr. Murphy refutes MTA's claim of his mendacity and demonstrates that MTA was well aware of the exact nature of his new.vanpool.

Mr. Murphy carefully describes the MTA procedure to create a new vanpool and the steps needed to deliver the van to the new vanpool in order to make it operational. (R. 801-8 17)

In its opinion, the panel overlooks several evidence and arguments that demonstrate MTA's awareness that Mr. Murphy's alleged September statement that the vanpool was a "go" and that the "Vanpool Group Information" Report (R. 510) that he submitted was for a new vanpool and procedurally only set into motion the vanpool program's process that, among other things, delivers a van to the new vanpool group:

- MTA's recognition that "Vanpool Group Information" Report contains a comment that the driver for the vanpool was "Pending" reflect that they were aware that a vanpool was not operational because the approval of the vanpool driver was still pending (See Appellee's brief pg *5*, R. 338. and R 801, R 510)

- The September 26, 2002 reminder from Mr. Murphy's supervisor to deliver the van demonstrates that MTA was aware that his "Vanpool Group Information" Report and "go" statement did not mean a van had already been delivered to the new vanpool and that the vanpool was operational. (R. 869) On the contrary the evidence support Mr. Murphy's contention that his action represented only the initial steps to effect an operational vanpool

- Plaintiffs September 18, 2002 email to his supervisor regarding the vanpool in question demonstrate that he informed MTA that a van had not already been delivered because a driver had not been approved. (R. 857)

This Court has previously held that the Court may not properly consider hearsay evidence when deciding a motion for summary judgment. *See Hearn v. Greyhound Lines,* Case No. 3:97-CV-1483-R, UNITED STATES DISTRICT **COURT FOR** THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION, 1998 U.S. Dist. LEXIS 11375, July21,

1998) *See Cormier v. Pennzoil Exploration & Prod. Co.*, 969 F.2d 1559, 1561 (SthCir. 1992) (citing *Martin v. John W Stone Oil Distrib., Inc.*, 819 F.2d 547, 549 (5th Cir. 1987) (Neither the district court nor the cfrcuit court of appeals may properly consider hearsay evidence in affidavits and depositions).

- The September 27, 2002 email that Mr. Murphy received from his supervisor reflect that MTA was aware that Mr. Murphy was still attempting to deliver a van to the vanpool in question. (R 876)

- Plaintiffs September 30, 2002 email to his supervisor confirm an ongoing dialogue that the delivery of the van to the vanpool in question was delayed due to the volunteer driver being transferred. (R 879)

The record evidence mentioned above demonstrates that MTA was aware that Mr.

Murphy's September 2002 actions were efforts to initiate the delivery of the van to the vanpool and was not deceptive representation that a vanpool was operational.

While the Defendants have only a burden of production (and not persuasion), that does not mean the mere assertion of facts by the Defendants — via interested witnesses — must be believed. To the contrary, it is quite striking in this case that MTA cannot offer even an iota of evidence coffoborating their claim that a vanpool did not existed and that Mr. Murphy's September 2002 communication deceived them into believing that it existed and was operational.

The notion that MTA's motion rests solely upon the hearsay statements (no testimony was provided) found in a memo prepared by an interested witnesses is crucial for three reasons. First, the Supreme Court explained in *Reeves* that the lower courts should not base summary judgments on evidence that comes from interested witnesses. *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 2110,147 L. Ed. 2d 105, 120 5. Ct. 2097 (2000). Second, the Fifth Circuit holds that cases, which turn crucially on the credibility of witnesses' testimony, should not be resolved on summary judgment. *Bazan v. Hidalgo County,* 246 F.3d th Cir. 2001), *quoting Abraham v. Raso,* 183 F.3d 279, 287 (td Cir. 1999). And third, this Court may only reach factual conclusions on a summary judgment motion if they are the "the only reasonable interpretation" of the record. *Blow v. City of San Antonio,* 236 F.3d 293, 297 (th Cir. 2001). Given that a motion hinging entirely on the testimony of interested-witnesses (e.g., Green and Hauser) inherently calls their credibility into question, *Baron,* 246 F.3d at 492, their word alone cannot be accepted as truthful and their promise that they are telling the truth cannot yield "the only reasonable interpretation" of the evidence. if other words, because their testimony as a matter of law is subject to the jury's credibility assessment, *Reeves,* 120 S.Ct. at 2110, their word alone should not form the basis of a summary judgment.

The Court should construe the evidence in the light most favorable to Mr. Murphy and draw all reasonable inferences in his favor. *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, *150-51,* 147 L. Ed. 2d *105,* 120 S. Ct. 2097 (2000). ffithepresent case, the district court inserted his opinion in determining that Plaintiffs summary judgment evidence on the existence of the vanpool was not credible and

accused him of lying when he relied on MTA's conclusionary statements and hearsay evidence that the vanpool did not exist. The panel has overlooked this error and has failed to recognize that the very existence of the vanpool is a material fact to the establishment of pretext.

The Supreme Court's unanimous decision in *Reeves* v. *Sanderson Plumbing Products, Inc., 530* U.S. 133 (2000) makes summary judgment in this case inappropriate because Mr. Murphy presents evidence that MTA's asserted reasons for the termination decision are false. In *Reeves,* the Court ruled that discrimination might be inferred solely from a plaintiffs *prima facie* case[2] and evidence that the employer's proffered reason for the employment decision is false. The Court found that the Fifth Circuit had erred by determining that to prove discrimination, the plaintiff had to submit additional, independent evidence of discrimination, thereby rejecting the "pretext-plus" requirement that previously existed in the circuit. *See, e.g., Rhodes v. Guiberson Oil Tools,* 75 F.3d 989 (t11 Cir. 1996). *Reeves* states:

2 The Panel assume that Mr. Murphy did present a prima facie case.

> Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive. In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is

> consistent with the general principle of evidence law that the fact finder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt.' Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision. Thus, a plaintiffs prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.

Reeves, at 530 U.S. at 147-48 (internal citations omitted).

MTA based its defense of Mr. Murphy's termination on the false vanpool reporting as the

sole violation of Mr. Murphy's Performance Improvement Plan that resulted in his termination. If Mr. Murphy had not violated his PIP, he would not have been terminated. MTA's nondiscriminatory reasons for terminating Mr. Murphy had been proven to be false. For these reasons, the panel should rehear the portion of the case dealing with a finding of Pretext.

- CONCLUSION

Jerry Murphy respectfully asks this Court to withdraw its opinion and reverse the district court's summary judgment and remand it for further proceeding.

Respectfully submitted,

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App. 15

UNITED STATES COURT OF APPEALS
For the Fifth Circuit
No. 04-20334
Summary Calendar

JERRY MURPHY, PLANTIFF
VS.
METROPOLITAN TRAISIT AUTHORITY, DEFENDANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS
03-CV-4804

Before Davis, Smith and Dennis, Circuit Judges, PER CURIAM: Jerry Murphy, appearing pro se, challenges his employment discrimination suit against his former employer, MTA. We affirm the district court judgment because Murphy has not rebutted MTA' s nondiscriminatory reason for termination.

I.

Murphy, a fifty—seven-year—old African American male, was hired by MTA to work on a program designed to promote and organize citizen—run shuttle van service for cooperating commuters, called Rideshare. Over the course of Murphy's employment his performance evaluations steadily declined, finally resulting in an overall unsatisfactory review. Because of his poor performance Murphy was placed in a ninety day performance improvement plan which required weekly reports to superiors of plans of action and progress. Murphy was ultimately fired when he allegedly misled

superiors of the status of a particular commuter cooperative group, causing inconvenience and losses for MTA.

Murphy alleges that he was fired, not for the stated reason, but because of his age and race. Murphy also applied for and was denied a promotion during his tenure at MTA.

Although a more qualified candidate was chosen instead of him, Murphy asserts that the failure to promote him was also due to discrimination.

Following his termination Murphy filed a complaint with the EEOC alleging age and race discrimination. The complaint was dismissed after an EEOC investigation, at which time Murphy filed suit in Texas state court again alleging race and age discrimination in MTA's failure to promote him and in terminating him. MTh removed the case to federal court and the district court granted the MTA's motion for summary judgment. Murphy now appeals that judqment.

II.

We review a grant of summary~ judgment de *novo* applying the same standards applying the same legal standards as the district court in determining whether summary judgment was appropriate. *Hudson* v. Forest *Oil Corp.*, 372 F.3d 742, 744 (5th Cir.2004) "Summary judgment is proper if - . . There is no genuine issue as to *any* material fact that the moving party is entitled to judgment as a matter of law." *Young v. Equifax Credit Info. Servs., Inc.*, 294 Ft3d 631, 635 (5th Cir.2002) . "In determining if there is a genuine issue of material .fact, this court reviews the evidence. in the

light most favorable to the non—moving party." *Performance Autoplex II Ltd. v. Mid—Continent Casualty Co.*, 322 F.3d 847, 853 (5th Cir.2003). Summary judgment must be upheld when the record provides a legal ground for the affirmance, regardless of whether the district court utilized or disregarded that ground. *S&W Enters., LLC, v. SouthTrust Bank of Ala., NA,* 315 F.3d 533, 537—38 (5th Cir.2003)

MTA argues that Murphy failed to present a prima facie case. For purposes of this appeal, however, we assume that Murphy did

present a prima facie case. Even assuming arguendo that Murphy has established a *prima facie* case, MTA has presented substantial evidence of valid, non-discriminatory reasons for Murphy's termination which have not, been sufficiently rebutted by Murphy.

See *Tex. Dep't of Cmty. Affairs v. Burdine,* 450 u.s. 248, 253 (1981) ("[I]f the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant 'to articulate some legitimate, nondiscriminatory reason for the employee s rejection.'") . Metropolitan submitted numerous e—mails and written memoranda documenting problems with Murphy's job performance over the course of his two—year employment. Every performance evaluation and nearly every correspondence in the record indicates Murphy's deficiency. Management finally terminated Murphy after

Numerous comments contained in Murphy's August 11, 2002 evaluation demonstrate his failings at work:

> Jerry has failed to follow management directives, in performance of his duties, choosing to continue to pursue unproductive avenues rather than proven activities he was directed to use. Jerry has made minimal contributions to date to the department objective of having 300 METROVans by the end of the
> year. He has formed one van to date this year, falling short of the planned goal of twelve vans a year for fiscal 2002.

R. 374

> In June, Jerry was given a list of over thirty companies that should have been researched and contacted. Some have yet to be researched and contacted. Jerry has made the decision to continue working with El Paso Energy for vanpool opportunities in spite of the fact they have excellent bus service

the dissolution of a van pool group that Murphy organized; Murphy tailed to provide prompt notice of the dissolution to management purportedly causing costs and significant inconvenience. These reasons are sufficient to satisfy MTA's burden of demonstrating non—discriminatory reasons for Murphy's termination.

Given the legitimate reasons for Murphy's termination, which are strongly supported by the summary judgment evidence, the burden

- of proof shifts to Murphy to demonstrate that MTA's non-discriminatory reasoning was pretextual and that discrimination was the actual basis for the adverse

employment action. *Roberson* v. *Alltel Information S~rVs.*, 373 F.3d 647, 651 (th Cir. 2004). To carry this burden Murphy has made conclusory statements that the

> along with plentiful parking . . . . Jerry made the decision this spring to send out a press release that was not approve_ as required and continued some activities against directions while keeping the activity hidden from management. Jerry has elected to continue use of presentation and communication approaches that have not been successful in the past two years which he has been instructed to abandon.

R. 374—73.

> Jerry's strengths of persistence and need to know details continue to be areas that bog him down as well. He continues to spend too much time working on small individual groups, as opposed to working at the corporate level through H.P. departments. He has been given reminders to re—focus his efforts on corporate accounts.

R. 372.

reason for termination was a sham because others were not fired for similar behavior and because the vanpool dissolution situation was
a mere misunderstanding not deserving of termination. Murphy

produced no corroborating evidence to support these allegations regarding the dissolution of the vanpool. Murphy has further made uncorroborated allegations that subtle age and racist comments were made during the course of his employment. Allegations in and of themselves cannot undermine MPA's legitimate non—discriminatory reasons for termination or defeat defendant's motion for summary judgment. Nuwer *v. Mariner Post—Acute Network,* 332 F.3d 310, 314

(5th Cir. 2003)
Moreover, Murphy has produced no evidence that could undermine the poor performance evaluations that he received during his employment at MTA.[3] Murphy has not demonstrated that the reasons for his termination were pretextual and therefore has

not satisfied his burden, of proof.
Summary judgment was

appropriate.

For the reasons set forth above, the judgment of the district court is AFFIRMED)

[3]Murphy has forfeited his failure to promote claim on appeal. Appellant's Brief at 17—18 ("Even though *Mr.* Murphy relinquishes his claim of age and racial biases in his application for the manager' s position

On May 3, 2004, Murphy filed a Motion for Relief with the Court. Given the denial of Murphy's appeal on the merits that motion is denied as moot.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

JERRY MURPHY, Plaintiff
Vs.
Metropolitan Transit Authority, Defendant

Civil Action H-03-4804

United States Courts
Southern District Of Texas
ENTERED
MAR 23 2004

Michael N. Milby, Clerk Of Court

Opinion On Summary Judgment

I. Introduction

A 60-year-old , black male was fired. He says that it was because of his age and race. His employer says that it fired him for lying. The employer has moved for summary judgment and will prevail.

2. Background

Two events prompts Murphy's discrimination claims: (1) the denial of a promotion and (2) his termination.

In August 2000, Metro hired Jerry Murphy to work as a vanpool-development representative. He was 57. His duties included creating and maintaining vanpools for Houston-area companies . He had trouble doing his job.

In March 2002, Murphy's immediate supervisor, William Pitts, wrote Murphy, expressing his frustration

with Murphy's inability to complete tasks as directed. Murphy's performance did not improve. One month later, Murphy applied to be manager of benefits-a promotion. In late August, Murphy received a performance review that documented his deficient performance. That same day, Pitts and Murphy signed a performance improvement plan-a detailed list of how Murphy could fix problems in his work. The plan was to last 90 days. The plan also told Murphy that, if he was unable to improve, he risked discipline, including termination.

A week later, Murphy unsuccessfully challenged the performance review. David McMaster, one of Pitts's supervisors, found that Pitts's assessment was accurate. McMaster expressed his own criticism of Murphy's performance and urged Murphy to improve quickly.

That July, Murphy received notice that Metro had promoted a woman who was more than 40 years of age as manager of benefits.

In mid-September 2002,Murphy submitted paperwork for a new vanpool that he had been arranging; it lead supervisors and coordinators to believe that the pooi had become active. This new group was reported to Metro officials, and Metro applied for federal funding for it. In early October, Murphy's supervisors discovered that the vanpool had never started operating. On October 1o, Murphy was fired.

Murphy sues, saying that he received the negative evaluation, the denial of the promotion, and the termination on account of his age and race.

3. Promotion.

To prevail on his failure-to promote claim, Murphy must show that he was clearly the superior candidate. E.E.O.C *v. Louisiana Office of* Comm. Svcs., ~ F.d '438, **1145** (sth Cir. **1995).** He must also show that Metro failed to promote him because of his protected characteristics—in this case, his age and race. *Hazen Paper Co. v.* Biggins, **507** U.S. **604,** 609 (1993); *Elliott* v. Group *Medical & Surgical Service,* 714 F.2d 556 (th Cir. 1983). He has done neither.

Murphy admits that he was not more qualified to be manager of benefits than the woman whom Metro promoted. He also concedes that his race and age did not motivate the denial of the promotion. This ends that claim.

Murphy simply speculates that a supervisor's comments about him hurt his candidacy. He does not know which manager said something negative, and he offers no evidence of what was said. He merely suspects that his managers said something bad because they were on the same floor as the human resources director who interviewed him

Whatever was said, Murphy has not shown that his manager mentioned Murphy's age or race. The comments, then, cannot form the basis of a discrimination claim.

4. Termination.

Murphy says that Pitts gave him a unfavorable written review because of his age and race. He asserts that he was then fired based on **(t)** his age and race and **(2)** his challenge to the review. He does not distinguish between the age and race claims, saying only that Metro was plagued by ~ "racist and age-biased mindset."

The record directly contradicts Murphy's assertions. First, Metro hired Murphy when he was ~ If Metro was going to discriminate against Murphy, it never would have hired him in the first place.

Second, sixty percent of Metro employees are black. In fact, Murphy's supervisors were themselves protected-class members. Like Murphy, Pitts was a black man over the age of **40.** Evangeline Soto-Chairez, Pits's supervisor, was Murphy's same age. Her supervisor, David McMaster, was also more than **40** years of age. While possible, it is unlikely that they discriminated against Murphy, with whom they shared protected traits. *Taylor* v. *Proctor & Gamble Dover Wipes,* 184 F.Supp._d **402,413** (DOd. **2002),** *affld* No. **1701** (d Cir. Dec. **4,2002).** Murphy has offered nothing to show otherwise.

Last, Murphy's challenge to his review did not make him immune from being fired. So long as it did not fire him for his age or race, Metro could fire Murphy for whatever reason it chose.

Metro has demonstrated that its reason for firing Murphy was nondiscriminatory. Murphy was under scrutiny for performance problems. During this time, he lied about the existence of a vanpool. Metro fired him for this.

Murphy contends that Metro was wrong about what he said about the vanpool, but he concedes that he did submit paperwork for the group and did say that the van was a "go." Lie says, however, that he never represented that die group was active. Murphy views Metro's insistence that he lied as another example of continued mistreatment that he suffered. Murphy wishes away the paper record that he produced.

Mistreatment does not equal discrimination, and the facts show that Murphy fabricated his work record.

Second, even if Metro had misinterpreted the representations about the vanpool, Murphy still would have no claim. It is irrelevant whether Metro's grounds for firing Murphy were erroneous as long as they were not transparent or falsc. *Mayheriy v.*

Vought Aircraft *Co.,* 55 F.d roB6, **1091** (sth Cu. **1995).** Metro has shown that they were not.

5. Conclusion.

Murphy has shown no facts that suggest that Metro fired him because of his age or race. He has only guessed andsupposed. Metro, on the other hand, has substantiated why it fired Murphy: he misrepresented work that he did after a long time of underachieving. Metro prevails, and Murphy will take nothing on the judgment.

22—

Signed **March** _____, **2004,** at Houston, Texas.

Lynn N. Hughes
United States District Judge

United States Courts
Southern District of Texas
Entered
MARCH 23 2004
Michael N. Milby, Clerk Of County

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT

JERRY MURPHY, Plaintiff

Vs

METROPOLITAN TRANSIT AUTHORITY, Defendant

CIVIL ACTION H-03-4804

FINAL JUDGEMENT

Metro prevails, and Murphy takes nothing on the judgment.

Signed March 22, 2004, at Houston, Texas.

Lynn N. Hughes *(signature)*
United States District Judge